

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT G. PAULEY, )  
Plaintiff, ) NO. CV-04-3144-MWL  
v. ) ORDER GRANTING DEFENDANTS'  
JOOP DEJONGE, et al., ) MOTION FOR SUMMARY JUDGMENT  
Defendants. )  
\_\_\_\_\_  
)

I. Procedural History

Plaintiff Robert G. Pauley ("Plaintiff") was formerly incarcerated at Ahtanum View Correctional Complex ("AVCC"), but was released on February 22, 2005 and is currently on community supervision by the Department of Corrections. (Ct. Rec. 14, p. 1). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims Defendants violated his constitutional rights by enacting a no smoking policy at AVCC during the time he was incarcerated at AVCC. (Ct. Rec. 1).

On February 22, 2005, the parties consented to proceed before a magistrate judge. (Ct. Rec. 5). On August 29, 2005, Defendants filed a timely motion for summary judgment. (Ct. Rec. 12). On October 17, 2005, pursuant to Local Rule 7.1(h), the Court ordered

ORDER - 1

1 the hearing on Defendants' pending motion for summary judgment be  
 2 reset from October 5, 2005, to December 1, 2005. (Ct. Rec. 16).  
 3 The court issued Plaintiff a *Klingele/Rand* notice after the  
 4 Defendants filed their motion for summary judgment, to ensure  
 5 Plaintiff understood the implications of a grant of summary  
 6 judgment and to permit him the opportunity to file his opposition  
 7 accordingly. (Ct. Rec. 17). *Rand v. Rowland*, 154 F.3d 952 (9<sup>th</sup>  
 8 Cir. 1998); *Klingele v. Eikenberry*, 849 F.2d 409 (9<sup>th</sup> Cir. 1988).  
 9 To date, the Court has received no response by Plaintiff to  
 10 Defendants' motion for summary judgment. Pursuant to Local Rule  
 11 56.1(d), the failure to file a statement of specific facts in  
 12 opposition to a motion for summary judgment allows the court to  
 13 assume the facts as claimed by the moving party exist without  
 14 controversy.

15 **II. Legal Standard**

16 Summary judgment is appropriate when it is demonstrated that  
 17 there exists no genuine issue as to any material fact, and that  
 18 the moving party is entitled to judgment as a matter of law. Fed.  
 19 R. Civ. P. 56(c). Under summary judgment practice, the moving  
 20 party

21 [A]lways bears the initial responsibility of informing the  
 22 district court of the basis for its motion, and identifying  
 23 those portions of "the pleadings, depositions, answers to  
 24 interrogatories, and admissions on file, together with the  
 affidavits, if any," which it believes demonstrate the  
 absence of a genuine issue of material fact.

25 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[W]here the  
 26 nonmoving party will bear the burden of proof at trial on a  
 27 dispositive issue, a summary judgment motion may properly be made  
 28 in reliance solely on the 'pleadings, depositions, answers to  
 interrogatories, and admissions on file.'" *Id.* Indeed, summary

1 judgment should be entered, after adequate time for discovery and  
2 upon motion, against a party who fails to make a showing  
3 sufficient to establish the existence of an element essential to  
4 that party's case, and on which that party will bear the burden of  
5 proof at trial. *Celotex Corp.*, 477 U.S. at 322. "[A] complete  
6 failure of proof concerning an essential element of the nonmoving  
7 party's case necessarily renders all other facts immaterial." *Id.*  
8 In such a circumstance, summary judgment should be granted, "so  
9 long as whatever is before the district court demonstrates that  
10 the standard for entry of summary judgment, as set forth in Rule  
11 56(c), is satisfied." *Id.* at 323.

12 If the moving party meets its initial responsibility, the  
13 burden then shifts to the opposing party to establish that a  
14 genuine issue as to any material fact actually does exist.  
15 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,  
16 586 (1986). In attempting to establish the existence of this  
17 factual dispute, the opposing party may not rely upon the denials  
18 of its pleadings, but is required to tender evidence of specific  
19 facts in the form of affidavits, and/or admissible discovery  
20 material, in support of its contention that the dispute exists.  
21 Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n.11. The  
22 opposing party must demonstrate that the fact in contention is  
23 material, i.e., a fact that might affect the outcome of the suit  
24 under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
25 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec.*  
26 *Contractors Ass'n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987), and that the  
27 ///  
28 ///

1 dispute is genuine, i.e., the evidence is such that a reasonable  
 2 jury could return a verdict for the nonmoving party, *Wool v.*  
 3 *Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9<sup>th</sup> Cir. 1987).

4 In the endeavor to establish the existence of a factual  
 5 dispute, the opposing party need not establish a material issue of  
 6 fact conclusively in its favor. It is sufficient that "the  
 7 claimed factual dispute be shown to require a jury or judge to  
 8 resolve the parties' differing versions of the truth at trial."  
 9 *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary  
 10 judgment is to 'pierce the pleadings and to assess the proof in  
 11 order to see whether there is a genuine need for trial.'"  
 12 *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)  
 13 advisory committee's note on 1963 amendments).

14 In resolving the summary judgment motion, the court examines  
 15 the pleadings, depositions, answers to interrogatories, and  
 16 admissions on file, together with the affidavits, if any. Fed. R.  
 17 Civ. P. 56(c). The evidence of the opposing party is to be  
 18 believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences  
 19 that may be drawn from the facts placed before the court must be  
 20 drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587  
 21 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)  
 22 (per curiam)). Nevertheless, inferences are not drawn out of the  
 23 air, and it is the opposing party's obligation to produce a  
 24 factual predicate from which the inference may be drawn. *Richards*  
 25 *v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal.  
 26 1985), *aff'd*, 810 F.2d 898, 902 (9<sup>th</sup> Cir. 1987).

27       ///

28       ///

1       Finally, to demonstrate a genuine issue, the opposing party  
 2 "must do more than simply show that there is some metaphysical  
 3 doubt as to the material facts. Where the record taken as a whole  
 4 could not lead a rational trier of fact to find for the nonmoving  
 5 party, there is no 'genuine issue for trial.'" *Matsushita*, 475  
 6 U.S. at 587 (citation omitted).

7       III. Discussion

8           A. Cruel and Unusual Punishment

9       To constitute cruel and unusual punishment in violation of  
 10 the Eighth Amendment, prison conditions must involve "the wanton  
 11 and unnecessary infliction of pain." *Rhodes v. Chapman*, 452 U.S.  
 12 337, 347 (1981). Although prison conditions may be restrictive  
 13 and harsh, prison officials must provide prisoners with food,  
 14 clothing, shelter, sanitation, medical care, and personal safety.  
 15 *Id.*; *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9<sup>th</sup> Cir. 1986);  
 16 *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9<sup>th</sup> Cir. 1982). "To the  
 17 extent that such conditions are restrictive and even harsh, they  
 18 are part of the penalty that criminal offenders pay for their  
 19 offenses against society." *Rhodes*, 452 U.S. at 347.

20       "[E]xtreme deprivations are required to make out a[n] [Eighth  
 21 Amendment] conditions-of-confinement claim." *Hudson v. McMillian*,  
 22 503 U.S. 1, 9 (citation omitted). "Because routine discomfort is  
 23 part of the penalty that criminal offenders pay for their offenses  
 24 against society, only those deprivations denying the minimal  
 25 civilized measure of life's necessities are sufficiently grave to  
 26 form the basis of an Eighth Amendment violation." *Id.* (quotations  
 27 and citations omitted).

28       ///

1       In this case, the condition of confinement of which Plaintiff  
2 complains is the right to smoke. Plaintiff has made no showing  
3 that smoking is a fundamental right. A ban on smoking is not a  
4 deprivation of one's life necessities such as food, clothing,  
5 shelter, sanitation, medical care, and personal safety. Moreover,  
6 as noted by Defendants, the smoking ban at AVCC protects the  
7 rights of non-smoking inmates, staff and visitors, and eliminates  
8 potential fire hazards. (Ct. Rec. 13, p. 7). There is no genuine  
9 issue for trial with regard to an Eighth Amendment claim in this  
10 case; therefore, the Court finds that Defendants have met their  
11 burden as the parties moving for summary judgment. Accordingly,  
12 Defendants' motion is GRANTED with respect to Plaintiff's Eighth  
13 Amendment claim against Defendants.

14           B. Equal Protection Claim

15       Equal protection claims arise when a charge is made that  
16 similarly situated individuals are treated differently without a  
17 rational relationship to a legitimate state purpose. *San Antonio*  
18 *School District v. Rodriguez*, 411 U.S. 1 (1972). In order to  
19 state a § 1983 claim based on a violation of the Equal Protection  
20 Clause of the Fourteenth Amendment, a plaintiff must show that  
21 defendants acted with intentional discrimination against plaintiff  
22 or against a class of inmates which included plaintiff. *Village*  
23 *of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (equal  
24 protection claims may be brought by a "class of one"); *Reese v.*  
25 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9<sup>th</sup> Cir. 2000);  
26 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9<sup>th</sup> Cir. 1998); *Federal*  
27 *Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 471 (9<sup>th</sup> Cir.  
28 1991); *Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9<sup>th</sup> Cir.

1 1985). "A plaintiff must allege facts, not simply conclusions,  
2 that show that an individual was personally involved in the  
3 deprivation of his civil rights." *Barren*, 152 F.3d at 1194.

4 Plaintiff contends that he has been treated differently than  
5 others similarly situated because the State allows other prisoners  
6 in other institutions smoking privileges under the same or similar  
7 custody levels. (Ct. Rec. 1). However, a similar argument was  
8 considered by the court in *Webber v. Crabtree*, 158 F.3d 460 (9<sup>th</sup>  
9 Cir. 1998). In rejecting that argument, the Ninth Circuit held  
10 that inmates are not members of a suspect class. *Id.* at 461.  
11 Plaintiff fails to demonstrate that he is a member of a suspect  
12 class. Moreover, the AVCC smoking ban is rationally related to a  
13 legitimate state purpose; namely, protecting the health and safety  
14 of inmates and staff by providing a clean air environment.  
15 Accordingly, Plaintiff's allegations do not give rise to a claim  
16 for relief under section 1983 for violation of the Equal  
17 Protection Clause. The Court finds that there is no genuine issue  
18 for trial with regard to Plaintiff's equal protection claim and  
19 Defendants have thus met their burden as the parties moving for  
20 summary judgment. Therefore, Defendants' motion for summary  
21 judgment is GRANTED with respect to Plaintiff's equal protection  
22 claim against Defendants.

23 C. Due Process

24 Plaintiff contends that his due process rights were violated  
25 because the same person who implemented the no smoking policy was  
26 the same person who heard his appeal for the infractions and  
27 sanctions imposed on him for violating the policy. (Ct. Rec. 1).

28 ///

1       The Due Process Clause protects prisoners from being deprived  
2 of liberty without due process of law. *Wolff v. McDonnell*, 418  
3 U.S. 539, 556 (1974). Where a protectable liberty interest  
4 exists, the Supreme Court has set out the following procedural due  
5 process requirements for disciplinary detention of a prisoner: (1)  
6 written notice of the charges; (2) at least 24 hours between the  
7 time the prisoner receives written notice and the time of the  
8 hearing, so that the prisoner may prepare his defense; (3) a  
9 written statement by the fact finders of the evidence they rely on  
10 and reasons for taking disciplinary action; (4) the right of the  
11 prisoner to call witnesses in his defense, when permitting him to  
12 do so would not be unduly hazardous to institutional safety or  
13 correctional goals; (5) legal assistance to the prisoner where the  
14 prisoner is illiterate or the issues presented are legally  
15 complex. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

16       In this instance, the undisputed facts reveal that all of the  
17 *Wolff* requirements were met in each of Plaintiff's four  
18 disciplinary hearings. Plaintiff received written notice of the  
19 charges against him more than 24 hours prior to the hearing, he  
20 was given an opportunity to present witness statements on his  
21 behalf, and he was given a written statement outlining the hearing  
22 officer's decision. Accordingly, Plaintiff received all of the  
23 process he was entitled to under federal law.

24       Plaintiff contends that the hearing officer was unfair or  
25 biased since the individual implementing the no smoking policy was  
26 the same person hearing his appeals. Due Process does forbid  
27       ///  
28       ///

1 officials who are directly or substantially involved in the  
2 underlying factual events of the charges, or the investigation of  
3 the charges, from hearing the charge. *Piggie v. Cotton*, 342 F.3d  
4 660, 667 (7<sup>th</sup> Cir. 2003). However, in the instant case, the  
5 undisputed facts reveal that Barbara Whitehead, the hearing  
6 officer at all four hearings, was not involved in the events  
7 leading to Plaintiff's infractions and did not investigate those  
8 charges. In addition, the smoking ban policy was implemented by  
9 the Department of Correction, and Superintendent Joop DeJonge  
10 merely complied with the DOC policy. The Superintendent's role in  
11 the appeal process was not a de novo determination of guilt but  
12 merely a review of the record to ensure that the due process  
13 requirements were satisfied.

14 Based on the foregoing, it is apparent that Plaintiff's  
15 disciplinary hearings were in accord with the due process clause  
16 and there is no genuine issue for trial with regard to Plaintiff's  
17 due process claim. Defendants' motion for summary judgment with  
18 respect to Plaintiff's due process claim against Defendants is  
19 GRANTED.

20 Due to the findings indicated above, the Court need not reach  
21 Defendants' arguments that Defendant Joop DeJonge is entitled to  
22 qualified immunity from the suit or that Defendant Department of  
23 Corrections/Ahtanum View Correctional Complex is not a "person"  
24 for purposes of Section 1983.

25 IV. Conclusion

26 For the reasons discussed above, this Court **GRANTS**  
27 Defendants' motion for summary judgment. (Ct. Rec. 12).

28 ///

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter judgment in favor of Defendants and against Plaintiff, file this Order, provide a copy to Plaintiff and counsel for Defendants, and **CLOSE** this file.

DATED this 5<sup>th</sup> day of December 2005.

S/ Michael W. Leavitt  
MICHAEL W. LEAVITT  
UNITED STATES MAGISTRATE JUDGE